

1 JOHN McBRIDE, ESQ., SBN 36458
2 CHRISTOPHER E. PLATTEN, ESQ., SBN 111971
3 MARK S. RENNER, ESQ., SBN 121008
4 Wylie, McBride, Platten & Renner
5 2125 Canoas Garden Avenue Suite 120
6 San Jose, CA 95125
7 Telephone: 408.979.2920
8 Facsimile: 408.979.2934
9 cplatten@wmprlaw.com

10 Attorney for Plaintiffs and Petitioners
11 ROBERT SAPIEN, MARY KATHLEEN McCARTHY,
12 THANH HO, RANDY SEKANY and KEN HEREDIA

ENDORSED
FILED

JUN 06 2012

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

M. Rawson

13 **IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
14 **IN AND FOR THE COUNTY OF SANTA CLARA**

15 ROBERT SAPIEN, MARY KATHLEEN
16 McCARTHY, THANH HO, RANDY
17 SEKANY and KEN HEREDIA

18 Plaintiffs and Petitioners,

19 vs.

20 CITY OF SAN JOSE, DEBRA FIGONE, in
21 her official capacity as City Manager of
22 the CITY OF SAN JOSE, and Does 1
23 through 15,

24 Defendants and Respondents.

25 THE BOARD OF ADMINISTRATION FOR
26 THE 1961 SAN JOSE POLICE AND FIRE
27 DEPARTMENT RETIREMENT PLAN,

28 Necessary Party in Interest

Case No. 112CV225928

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF AND PETITION FOR
WRIT OF MANDATE/PROHIBITION OR
OTHER APPROPRIATE WRIT RELIEF**

By this action, plaintiffs and petitioners, active and retired members of the 1961 San Jose Police and Fire Department Retirement Plan (Plan), seek injunctive, declaratory and writ relief to invalidate certain amendments to the San Jose City Charter as violations of their vested contract rights.

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1 Plaintiffs and petitioners allege:

2 **PUBLIC EMPLOYEE PENSION RIGHTS ARE PROTECTED UNDER CALIFORNIA LAW**

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4 1. Under California law, when a public entity creates a pension system, the
5 right to that pension immediately vests when an employee accepts employment. A
6 pension system may be modified prior to employee retirement for the limited purpose
7 of keeping the system flexible and to maintain the integrity of the system. Before
8 employee pension rights can be detrimentally affected, commensurate benefits must
9 be given the employee to prevent an unconstitutional impairment of pension
10 entitlements. When governmental action impairs vested pension rights, the courts are
11 required to enjoin such conduct.
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14 2. Firefighters employed by the City since 1961 have participated in the
15 Plan provided under San Jose Municipal Code (SJMC), Chapter 3.36, §§ 3.36.010 et
16 seq., a true and correct copy of the Plan is attached as Exhibit A. On June 5, 2012, San
17 Jose voters enacted Local Measure B, a true and correct copy of which is attached as
18 Exhibit B. It amends the City Charter to impose various changes and limitations to
19 Plan benefits for active and retired firefighters. These changes and limitations
20 unconstitutionally impair Plaintiffs' and Petitioners' vested contract rights. These
21 impairments include, but are not limited to: (a) eliminating disability retirement
22 benefits by redefining eligibility to require that a firefighter be unable to perform as a
23 firefighter *and* "any other jobs described in the City's classification plan" in the Fire
24 Department because of the firefighter's medical condition, even if no such jobs are
25 available which the disabled firefighter can perform; (b) permitting the City Council
26 upon a declaration of a "fiscal and service level emergency" to suspend and forfeit
27
28

1 annual cost of living adjustments (COLAs) to retirees; (c) forcing employees to make
2 additional contributions for up to 50% of the pension plan's unfunded actuarially
3 accrued liability (UAAL); (d) forcing employees to make additional contributions for up
4 to 50% of the retiree medical plan's unfunded UAAL; and, (e) eliminating the
5 Supplemental Retiree Benefit Reserve (SRBR) which funds supplemental benefits to
6 annuitants and survivors.
7

8 **PARTIES**

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10 3. Plaintiff and petitioner Robert Sapien is a resident, taxpayer, and
11 registered voter of the County of Santa Clara, California. Plaintiff and Petitioner
12 Sapien is a San Jose firefighter and an active participant in the Plan.

13 4. Plaintiff and petitioner Mary Kathleen McCarthy is a San Jose firefighter
14 and an active participant in the Plan.

15 5. Plaintiff and petitioner Thanh Ho is a San Jose firefighter and an active
16 participant in the Plan.

17 6. Plaintiff and petitioner Randy Sekany worked as a San Jose firefighter for
18 the San Jose Fire Department (SJFD) for more than 28 years before retiring in 2008.
19 Plaintiff and Petitioner Sekany is a retired annuitant of the Plan.
20

21 7. Plaintiff and petitioner Ken Heredia worked as a San Jose firefighter for
22 the SJFD for more than 29 years before retiring in 1999. Plaintiff and Petitioner
23 Heredia is a retired annuitant of the Plan.
24

25 8. Defendant and respondent City of San Jose (City) is a municipal
26 corporation in the State of California that operates under the authority of the California
27 Constitution and the City Charter.
28

1 9. Defendant and respondent Debra Figone is the San Jose City Manager.
2 She is sued in her official capacity. Under the City Charter, Figone is the chief
3 administrative officer of the City responsible to the Council for the administration of
4 City affairs placed under her charge including but not limited to responsibility for the
5 faithful execution of all laws, provisions of the charter and acts of the Council which
6 are subject to enforcement by her or by officers who are under her direction and
7 supervision.
8

9 10. Defendants and respondents Does 1 through 15, inclusive, are sued
10 under fictitious names. Their true name and capacities are unknown to plaintiffs and
11 petitioners. When their true names and capacities are ascertained, plaintiffs and
12 petitioners will amend this complaint by inserting their true names and capacities.
13 Plaintiffs and petitioners are informed and believe, and thereon allege, that each of the
14 fictitiously named defendant and respondent is responsible in some manner for the
15 occurrences alleged in this action, and that plaintiffs' and petitioners' damages as
16 alleged in this action are proximately caused by those defendants and respondents.
17

18 11. Necessary Party in Interest the Board of Administration of the 1961
19 Police and Fire Department Retirement Plan (Board) is the body appointed by the City
20 Council responsible for managing, administering and controlling all funds in the Plan
21 established under the SJMC and the California Constitution, art. XVI, §17. The Board
22 administers the retirement system and performs various functions related to the Plan,
23 including determining eligibility for receipt of retirement benefits, the calculation of
24 employer and employee contributions, the management and investment of the Plan's
25 funds and the distribution of pension benefits to retired firefighters.
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JURISDICTION AND VENUE

12. Plaintiffs and petitioners bring this action for declaratory relief pursuant to Code of Civil Procedure §1060 to determine the constitutionality and validity of Measure B. Plaintiffs and Petitioners bring this action for injunctive relief pursuant to Code of Civil Procedure §§526 and 527 and Civil Code §52.1 to enjoin the implementation of Measure B because it violates plaintiffs' and petitioners' constitutional and contract rights. Plaintiffs and petitioners also bring this action as a petition for appropriate writ relief under Code of Civil Procedure §1085 to block implementation of Measure B as an unconstitutional impairment of contract under art. I, §9, an unconstitutional violation of substantive due process under art. I, §7 and an unconstitutional taking of property without just compensation under art. I, §19, respectively, of the California Constitution and the existing terms of the Plan. This action is properly filed in the County of Santa Clara pursuant to Code of Civil Procedures §§394 and 395 and Civil Code §52.1.

FACTS COMMON TO ALL CAUSES OF ACTION

13. Membership in the Plan is compulsory and a condition of employment for SJFFs. Retirement benefits under the Plan are funded by contributions from both the pension Plan's members and the City, which contributions are in turn invested for the benefit of the Plan members. Employee contributions for normal service cost and for COLAs are credited to member participation accounts. Employees make no contributions towards prior service cost, except for that portion of the contributions provided by SJMC §§3.36.1555. This Plan provision requires member contributions because of the increased benefits provided by SJMC §§3.36.805 and

1 §3.36.1020.B.3 The contributions under these Plan provisions cover the member
2 cost for benefits improvements retroactively provided by an interest arbitration award
3 under Charter §1111; the contributions represent the amount of normal service
4 contributions members would have made from the effective date of the benefit
5 increase (i.e., February 4, 1996) to the date of the interest arbitration award,
6 amortized like prior service costs. In contrast, the City's contributions are credited to
7 the Plan as a whole. When investments exceed the actuarially assumed investment
8 growth rate, the City's unfunded actuarially accrued liability (UAAL) for prior service
9 costs is reduced. Moreover, when the funding ratio with the Plan's assets to liabilities
10 exceeds 100%, the positive UAAL (or over-funding of the Plan) serves as a credit in
11 favor of the City by reducing its normal cost contributions.
12

13
14 14. As adopted, Measure B amends the City Charter to alter provisions of the
15 Pension Plan as it affects contribution rates and benefits for participants and
16 annuitants. Measure B reduces, changes or eliminates existing retirement benefits
17 enjoyed by current employees and retirees and reduces retirement benefits for San
18 Jose firefighters in pertinent part, as follows:
19

20 a. Disability Retirement. Under SJMC §3.36.900 et seq., active
21 firefighters are entitled to a disability pension benefit if they can no longer work as
22 firefighters. The Board determines entitlement for a disability retirement upon proof of
23 "incapacity for the performance of duty," whether service-connected or nonservice-
24 connected if under SJMC §3.36.970 the firefighter is "incapable of assuming the
25 responsibilities and performing the duties of the position then held by him [sic] or of
26 any other person in the same classification of positions [i.e., firefighter classifications]
27 to which the city may offer to transfer him" (SJMC §3.36.900). Among other things,
28

1 Measure B, §1509-A subd. (a) and (b) limits disability retirements for current and
2 future firefighters to instances where the SJFF is unable to perform any other job
3 within the SJFD, whether such job is available and whether or not the City offers
4 such a job to the firefighter. Thus, under Measure B, if a disabled firefighter is
5 capable of performing secretarial duties in the SJFD, but no such positions are
6 available, or such position is not offered, the firefighter is ineligible for disability
7 retirement benefits. Measure B, §1509-A subd. (c) displaces the responsibility for
8 determining eligibility for disability retirement benefits from the Board, and instead
9 vests that responsibility in "an independent panel of medical experts" subject to "a
10 right of appeal to an administrative judge." Measure B does not define a "medical
11 expert" nor does it define "an administrative judge". Measure B does not afford any
12 offsetting or comparable benefit or advantage to the Plan participants for §1509-A.
13
14

15 b. Cost-of-Living Adjustments. Under SJMC §3.44.150 San Jose
16 firefighter annuitants receive an annual COLA of 3% to their monthly allowance,
17 effective each February 1st. Measure B, §1510-A authorizes the Council to suspend
18 costs of living adjustment paid to current and future retirees for up to five years, if the
19 Council adopts a resolution declaring a fiscal and service level emergency based on
20 unidentified criteria. There is no requirement under Measure B to repay annuitants for
21 the suspension or forfeiture of the COLAs. Measure B does not afford any offsetting
22 or comparable benefit or advantage to Plan participants for §1510-A.
23
24

25 c. Contributions. Under SJMC §3.36.1500 et seq., the Plan requires
26 the City and SJFFs to make contributions towards the normal cost of the Plan in a
27 ratio of eight (City) to three (SJFF). Absent specific exceptions resulting from
28 collective bargaining, under SJMC §3.36.1550, the City is required to make 100% of

1 the contributions toward the UAAL that results from insufficient Plan assets to pay
2 projected retirement costs. Under Measure B, §1506-A subd. (b), beginning July 23,
3 2013, employees will be required to make additional contributions to pay the Plan's
4 UAAL. San Jose firefighters will contribute from 4% of pay, up to a maximum of
5 16% of pay per year, but no more than half the yearly cost to pay the UAAL. There is
6 no provision for a reduction in firefighter contributions in the event that the UAAL
7 declines to less than current amounts. Moreover, under Measure B, §1514-A, if a
8 court determines that the provisions of §1506-A subd. (b) are unenforceable,
9 equivalent monetary "savings" will be imposed on employees by "pay reductions".
10 Measure B does not afford any offsetting or comparable benefit or advantage to Plan
11 participants for §1506-A.
12

13
14 d. Retiree Health Benefits. Under SJMC §3.36.575, the Plan
15 establishes medical benefit accounts within the retirement fund to provide retiree
16 medical benefits, including benefits for sickness, accident, hospitalization, dental or
17 medical expenses. Contributions for the normal cost of these benefits are made by
18 the City and the firefighters for dental benefits in the ratio of three (City) to one
19 (firefighter) and for medical benefits in the ratio of one (City) to one (firefighter).
20 SJMC 3.36.1900 et seq. sets out eligibility criteria for medical benefits annuitants and
21 allocates the costs of premiums for medical benefits. Under Measure B, §1512-A, the
22 cost burden for unfunded liabilities for these benefits is shifted from the City to the
23 firefighters since they "must contribute a minimum of 50% of the cost of retiree
24 healthcare, including both normal cost and unfunded liabilities." Measure B does not
25 afford any offsetting or comparable benefit or advantage to Plan participants for
26 §1512-A.
27
28

1 e. Supplemental Retirement Benefits. Under SJMC §3.36.580 a
2 "gain sharing" segregated fund called the Supplemental Retiree Benefits Reserve
3 (SRBR) is established which requires the allocation of a portion of excess Plan
4 investment income to fund supplemental benefits to annuitants. Measure B, §1511-A
5 discontinues the SRBR, and returns the SRBR segregated funds to the Plan's general
6 fund and prohibits the payment of supplemental benefits out of the SRBR or other Plan
7 assets. Measure B does not afford any offsetting or comparable benefit or advantage
8 to Plan participants for §1511-A.
9

10 15. Plaintiffs and petitioners have no plain, speedy and adequate remedy in
11 the ordinary course of law, other than the relief sought in this complaint and petition,
12 because the constitutional violations at issue cannot be protected against and
13 plaintiffs' and petitioners' rights cannot be preserved absent injunctive or writ relief.
14

15 16. Defendants and respondents implementation of the foregoing provisions
16 of Measure B is wrongful conduct, and unless and until enjoined and restrained by
17 order of this court, will cause great and irreparable injury to plaintiffs and petitioners
18 by impairing provision of vested pension rights.
19

20 17. Plaintiffs and petitioners have no adequate remedy at law for the
21 wrongful implementation of the foregoing provisions of Measure B because it will be
22 impossible to determine the precise measure of damages that will be suffered if
23 defendants' and respondents' conduct is not restrained, and plaintiffs and petitioners
24 will be forced to institute a multiplicity of suits to obtain adequate compensation for
25 each individual's injuries.
26

27 18. Defendants and respondents have a non-discretionary legal, constitutional
28 and contractual duty to continue in effect all vested Plan provisions, rights and

benefits to plaintiffs and petitioners. At all times herein mentioned, defendants and respondents have been able to provide all provisions, rights and benefits under the Plan in effect as of June 4, 2012 to plaintiffs and petitioners.

**FIRST CAUSE OF ACTION
REQUEST FOR DECLARATORY RELIEF**

19. Plaintiffs and petitioners hereby incorporate by reference the preceding paragraphs.

20. Article I, §7 of the California Constitution prohibits the taking of property without due process.

21. Article I, §9 of the California Constitution prohibits laws that impair contracts.

22. Article I, §19 of the California Constitution prohibits the taking of private property for public use in the absence of just compensation.

23. An actual controversy has arisen and now exists between plaintiffs and petitioners and defendants and respondents relative to their respective rights and duties in that plaintiffs and petitioners contend that Measure B is unconstitutional, invalid and unenforceable, both on its face and as construed by defendants and respondents, because it impermissibly impairs vested contract rights to pension benefits under the Plan. The impairment is neither reasonable nor material to the theory of the pension system and its successful operation. It changes pension plan benefits in a manner which results in a disadvantage to employees and annuitants without comparable new advantages.

\\

1 24. Plaintiffs' and petitioners require a declaration as to the validity of
2 Measure B, both on its face and as applied to plaintiffs' and petitioners' status as
3 plan members. A judicial declaration is necessary and appropriate at this time so that
4 plaintiffs and petitioners may ascertain their rights and duties.

5 25. The City Council prepared and authorized Measure B, and based thereon,
6 plaintiffs and petitioners are informed and believe, and upon such information and
7 belief allege that the defendants and respondents dispute the allegations regarding
8 the invalidity of Measure B, their obligations under law, and the alleged violations of
9 the law.
10

11
12 **SECOND CAUSE OF ACTION**
13 **IMPAIRMENT OF CONTRACT**
14 **[CALIFORNIA CONSTITUTION ARTICLE I, §9]**

15 26. Plaintiffs and petitioners hereby incorporate by reference the preceding
16 paragraphs.

17
18 27. As set forth in the SJMC, the Plan gives rise to vested contractual rights
19 for employees both active participants and annuitants, prior to June 5, 2012.

20 28. Measure B impairs the contractual rights of plaintiffs and petitioners.

21 29. By impairing these contractual rights without giving plaintiffs and
22 petitioners any comparable advantage, commensurate benefit or compensation,
23 Measure B as applied to existing plan participants, both current San Jose firefighters
24 and annuitants, is unconstitutional and violates Article I, §9 of the California
25 Constitution.
26
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28

THIRD CAUSE OF ACTION
SUBSTANTIVE DUE PROCESS
[CALIFORNIA CONSTITUTION ARTICLE I, §7]

30. Plaintiffs and petitioners hereby incorporate by reference the preceding paragraphs.

31. Article I, §7 of the California Constitution prohibits the taking of property for a public purpose without due process of law.

32. Plaintiffs and petitioners have vested property right in the benefits provided by the Plan, and in the Plan itself, in place when they began working for the City, as well as any enhancements made during their service with the City.

33. By taking these protected benefits without giving plaintiffs and petitioners any comparable advantage, commensurate benefit or compensation, Measure B violates Article I, §7 of the California Constitution.

FOURTH CAUSE OF ACTION
TAKING
[CALIFORNIA CONSTITUTION ARTICLE I, §19]

34. Plaintiffs and petitioners hereby incorporate by reference the preceding paragraphs.

35. Article I, §19 of the California Constitution prohibits the taking of private property for public use in the absence of just compensation.

36. Plaintiffs and petitioners have vested property right in the benefits provided by the Plan, and in the Plan itself, in place when they began working for the City, as well as any enhancements made during their service with the City. In

1 addition, the retirement benefits are a form of promise for compensation.

2 37. By taking these protected benefits without giving plaintiffs and
3 petitioners any comparable advantage, commensurate benefit or compensation, the
4 provisions of Measure B violates Article I, §19 of the California Constitution as to the
5 taking of property for a public purpose without just compensation.
6

7 **FIFTH CAUSE OF ACTION**

8 **PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE WRIT
RELIEF**

9 1. Plaintiffs and petitioners hereby incorporate by reference the preceding
10 paragraphs.

11 2. Plaintiffs and petitioners are informed and believe, and upon such
12 information and belief allege that upon the effective date of Measure B, if not before,
13 defendants and respondents will implement the provisions Measure B and will not
14 abide by all Plan provisions, rights and benefits in effect as of June 4, 2012.
15

16 **PRAYER FOR RELIEF**

17 WHEREFORE, plaintiffs and petitioners pray for the following relief:

18 1. A declaration that:

19 a. The provisions of Measure B cannot be applied to plaintiffs and
20 petitioners because it violates their constitutional and contractual rights; and,
21

22 b. The defendants and respondents were and are required to provide
23 plaintiffs and petitioners with the Plan provisions, rights and benefits in place when
24 they began working for the City, as well as any enhancements made during their
25 service with the City.

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1 2. A preliminary and permanent injunction prohibiting the defendants and
2 respondents and the Board from applying or otherwise enforcing any part of Measure
3 B to plaintiffs and petitioners, inclusive of the admonition required under Civil Code,
4 §52.1;

5 3. A preemptory writ mandating defendants and respondents and the Board
6 apply all Plan provisions, rights and benefits in effect as of June 4, 2012 to plaintiffs
7 and petitioners and prohibiting the defendants and respondents from applying or
8 otherwise implementing Measure B to plaintiffs and petitioners;

9 4. Any and all actual, consequential and incidental damages according to
10 proof, including but not limited to damages that have been or made be suffered by
11 plaintiffs and petitioners and all costs incurred by plaintiffs and petitioners in an
12 attempt to enforce the constitutional, statutory and contractual rights and described
13 herein;

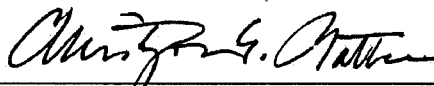
14 5. For attorneys' fees pursuant to California Civil Code §52.1, Code of Civil
15 Procedure §1021.5, Government Code §800 or otherwise;

16 6. For costs of suit herein incurred; and

17 7. For such costs and further relief as the Court deems just and proper.

18 Dated: June 5, 2012

19 WYLIE, McBRIDE,
20 PLATTEN & RENNER

21 

22 CHRISTOPHER E. PLATTEN

23 Attorneys for Plaintiffs and Petitioners
24 ROBERT SAPIEN, MARY KATHLEEN McCARTHY,
25 THANH HO, RANDY SEKANY and KEN HEREDIA

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